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UNITED STATES DISTRICT COURT  
 FOR THE  
 NORTHERN MARIANA ISLANDS

MOSES T. FEJERAN and  
 QIANYAN S. FEJERAN,  
 Plaintiffs,  
 vs.  
 AVIATION SERVICES (CNMI),  
 LTD. dba FREEDOM AIR,  
 Defendant.

CIVIL ACTION NO. 05-0033  
**DEFENDANT AVIATION SERVICES  
 (CNMI) LTD. DBA FREEDOM AIR'S  
 REPLY MEMORANDUM TO  
 PLAINTIFFS' OPPOSITION TO  
 DEFENDANT'S MOTION TO STRIKE  
 FRANK PEREZ AS AN EXPERT  
 WITNESS AND TO ORDER IME;  
 CERTIFICATE OF SERVICE**  
**HEARING DATE: MARCH 15, 2007  
 TIME: 1:30 P.M.**

**DEFENDANT AVIATION SERVICES (CNMI) LTD., DBA FREEDOM AIR'S  
 REPLY MEMORANDUM TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S  
 MOTION TO STRIKE FRANK PEREZ AS AN EXPERT WITNESS  
AND TO ORDER IME**

**I. INTRODUCTION**

Plaintiffs Moses T. Fejeran and Qianyan S. Fejeran agreed to produce their expert report by late September 2006, and to this date have failed to comply with that deadline. As a result, the testimony of their expert Frank Perez should be stricken.

1       Moreover, through this lawsuit Plaintiff Moses T. Fejeran has put his physical condition  
 2 at issue, and yet, unjustifiably refuses to submit to an IME in Honolulu at Defendant Aviation  
 3 Services (CNMI) Ltd. dba Freedom Air's expense. Defendant seeks an Order compelling  
 4 Plaintiff's attendance at an IME.

5       Defendant also seeks an award of fees and costs incurred in connection with preparing  
 6 and arguing these motions.

8       **II. PLAINTIFF'S EXPERT FRANK PEREZ MUST BE STRICKEN DUE TO THE**  
**UNTIMELY DISCLOSURE OF HIS EXPERT REPORT.**

10      At this late hour, Plaintiffs represent that they only informally estimated that they would  
 11 produce Frank Perez's report by the end of September 2006. That representation is incorrect. On  
 12 September 11, 2006, Plaintiffs advised the Court in the Joint Motion to Re-Set Trial Date that  
 13 they anticipated the completion of the expert report in mid- to late-September. In addition to  
 14 Plaintiffs' formal representations to the Court, there were numerous confirmations from  
 15 Defendant's counsel and verbal agreements and discussions between the parties in which it was  
 16 understood that Mr. Perez's report would be disclosed in late September 2006, and that  
 17 Defendant would then be given an opportunity to prepare its rebuttal report. *See* Mot., Ex. A.

19      It is now March 5, 2007, six months after Plaintiffs promised to produce the report. By  
 20 failing to make such disclosure, Plaintiffs have inflicted prejudice on Defendant and its own  
 21 expert witness, who will have only one month to review and analyze Mr. Perez's report. It  
 22 cannot be denied that Plaintiffs have gained a significant advantage in having seven months from  
 23 when its expert observed the aircraft and the ability to compile an expert report; whereas  
 24 Defendants' expert has one month to review the report, inspect and photograph the aircraft,  
 25 prepare a report and a rebuttal report.

27      Plaintiffs respond that they have until May 26, 2007 to produce an expert report, which  
 28 gives Plaintiffs nine months for the preparation of an expert report. A May 26 disclosure

1 deadline clearly contradicts Plaintiffs' stated representations of the report being ready by  
2 September 2006, and gives them ever further time to prepare an expert report, and less time for  
3 Defendant to complete its expert report.

4 Plaintiffs also point to the fact that Defendant has seen Mr. Perez's CV. This hardly  
5 qualifies as disclosure sufficient for Defendant to prepare a rebuttal report. Reviewing his CV  
6 and a list of other cases on which he has worked does not disclose the basis for Mr. Perez's  
7 conclusions or opinions, and in actuality provides no useful information to Defendant.

8 Rule 37 adequately deals with this situation of an untimely expert report: a "party that  
9 without substantial justification fails to disclose information . . . is not, unless such failure is  
10 harmless, permitted to use as evidence at a trial . . . any witness or information not so disclosed."  
11 Fed. R. Civ. P. 37(c)(1). Plaintiffs fail to demonstrate any substantial justification to support  
12 their untimely disclosure. Moreover, the error has not been harmless because of Defendant's  
13 inability to now prepare a rebuttal expert report within the short timeframe. Accordingly, Mr.  
14 Perez must be stricken as an expert.

15 **III. PLAINTIFF MUST BE COMPELLED TO ATTEND AN IME IN HONOLULU.**

16 Federal Rule of Civil Procedure 35 states that when a party has put his mental or physical  
17 condition at issue, the Court may order the party to submit to a medical examination. Plaintiff's  
18 only response to Defendant's Motion to Order an IME in Honolulu is that he simply does not  
19 agree to do so and has bad knees. However, neither objection is supportable. Because he has  
20 placed his physical condition at issue, Defendant has a right to obtain an independent medical  
21 examination, regardless of whether Plaintiff agrees to the examination or not. His excuse of  
22 being unable to travel due to his bad knees was also never mentioned while Plaintiff intended to  
23 travel to Honolulu to visit a life care expert.

24 Defendant's retention of Dr. Peter Diamond, a Honolulu physician, to conduct an IME of

1 Mr. Fejeran has been known to Plaintiff for months. The high cost of bringing Dr. Diamond to  
2 the CNMI would defeat this Court's earlier-stated intentions of keeping down litigation costs. It  
3 would be highly prejudicial and cost *inefficient* to require Defendant to find a new expert in the  
4 CNMI because of Plaintiff's sudden desire not to travel to Honolulu, even when it is not at his  
5 own expense.

6  
7 Defendant asks that the Court order and require Plaintiff to travel to Honolulu for the  
8 IME, as originally agreed upon by the parties.

9 **IV. CONCLUSION**

10 Plaintiffs' Opposition raises no substantial justification to permit the untimely disclosure  
11 of Mr. Perez's expert report, which has prejudiced Defendant and its ability to prepare an expert  
12 rebuttal report. Plaintiffs' expert report, and Mr. Perez's testimony, should therefore be stricken.

13 Plaintiff Moses Fejeran's Opposition also shows no justification to prevent an IME  
14 conducted in Honolulu, the most cost-efficient method of conducting an IME in this case.  
15 Defendant seeks an Order compelling Mr. Fejeran's attendance at the IME.

16 Finally, an award of Defendant's fees and costs is appropriate and warranted under the  
17 circumstances.

18 DATED: Hagåtña, Guam, March 5, 2007.  
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20 CARLSMITH BALL LLP

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22 /s/ David P. Ledger

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23 DAVID LEDGER  
24 Attorneys for Defendant  
25 Aviation Services (CNMI), Ltd.  
26 dba Freedom Air

**CERTIFICATE OF SERVICE**

The undersigned hereby declares that on the 5th day of March 2007, I will cause to be served, via electronic filing/service, a true and correct copy of **DEFENDANT AVIATION SERVICES (CNMI) LTD. DBA FREEDOM AIR'S REPLY MEMORANDUM TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO STRIKE FRANK PEREZ AS AN EXPERT WITNESS AND TO ORDER IME; CERTIFICATE OF SERVICE** upon the following Counsel of record.

George L. Hasselback, Esq.  
O'Connor Berman Dotts & Banes  
Second Floor, Nauru Building  
Post Office Box 501969  
Saipan, MP 96950

DATED: March 5, 2007.

/s/ David P. Ledger

DAVID LEDGER